

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 23, 2008

STATE OF TENNESSEE v. THOMAS MATTHEW GOSS

**Direct Appeal from the Circuit Court for Moore County
No. 1024 Robert Crigler, Judge**

No. M2007-00937-CCA-R3-CD - February 4, 2008

A Moore County jury found the Defendant, Thomas Matthew Goss, guilty of rape and aggravated burglary. The trial court sentenced him to an effective sentence of twelve years. On appeal, the Defendant raises two issues: (1) the State presented insufficient evidence to support the convictions; and (2) the trial court improperly sentenced him. Finding no error, we affirm the trial court's judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

Andrew Jackson Dearing, III (at trial and on appeal) and Dorothy Buck (at trial), Shelbyville, Tennessee, for the Appellant, Thomas Matthew Goss.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Renee W. Turner, Assistant Attorney General; Chuck Crawford, District Attorney General; Hollyann L. Hewgley and Ann L. Filer, Assistant District Attorney Generals, for the Appellee, State of Tennessee.

OPINION

I. Facts

At trial, the following evidence was presented: Rachel Carter, the victim's mother, testified that she lived with her daughter, B.V.¹; her son, Jeremiah Buchanan; her daughter, Shekara Buchanan; her baby, Erik Cole; her stepson, Kahmariez Ridley; and her fiancé, Erik Cole. Carter

¹ We will refer to the victim in this case by her initials due to the nature of the crime and the victim's age.

said B.V. slept in a bedroom by the “wash room.” On March 2, 2006, she heard a “truck start up” and “s[aw] [the Defendant’s] truck leaving out of [her] driveway.” Carter said she knew the truck belonged to the Defendant because she had seen it before. As the truck was leaving, B.V. came to Carter saying, “Mama . . . he touched me,” identifying the Defendant as the perpetrator. On cross-examination, Carter testified that B.V. was thirteen years old when this happened. On redirect, Carter admitted that when she saw the truck driving away, it was about twenty-five feet away and in the dark.

Officer Robin Holt, an officer with the Moore County Sheriff’s Department, testified that she went to the Defendant’s house on March 2, 2006. When she arrived there, the Defendant and his girlfriend were intoxicated and on the roof of the porch.

Officer Darren Harrison, an officer with the Moore County Sheriff’s Department, stated that he went to B.V.’s house for a reported burglary. He testified that the screen by B.V.’s bedroom was “displaced, but it was not on the ground.” In addition, there was a shoe print on the outside wall of the house. Officer Harrison said that after listening to B.V.’s story, he drove to the Defendant’s house, where he saw the Defendant’s white pick-up truck. He stated that the Defendant and his girlfriend were quite drunk, and he found the pair of them on the porch’s roof. On cross-examination, Officer Harrison said the shoe print was only a partial, so it was never compared with the Defendant’s shoe.

Officer Chad Holt, an officer with the Moore County Sheriff’s Department, testified that he went to B.V.’s house in response to a burglary report. He investigated the point of entry and the footprint, but he did not find any fingerprints. Holt stated that B.V. named the Defendant as her attacker and described his truck. When Holt went to the Defendant’s residence, he felt the hood of the Defendant’s truck, finding it warm from recent use.

B.V. testified that she lived with her mother, step-dad, sister, and three brothers when these events happened. B.V. said she shared her bedroom with her little sister and her little brother. Recounting the events of March 2, 2006, B.V. said she was sleeping and she woke when she “felt something enter [her] vagina.” She was wearing a pair of shorts and a tee-shirt. She said she sat up in bed and “pulled the covers over [herself],” and she saw someone on her bed. B.V. said the man identified himself using either the name Timothy or Thomas, and he said that he did not know what he was doing in her house. B.V. stated that she told the man to leave, at which point he shone the flashlight onto his own face, so she could see who he was, and then he admitted being drunk and left her house. B.V. said that when he put the flashlight to his face, she recognized the man as one of her step-father’s friends, and he was the Defendant. B.V. said the Defendant had previously been to her house “probably about two or three times.” She said that she did not hear him enter the house, but heard him leave via the laundry room window. When questioned about the touching, B.V. said that the Defendant was using his finger to touch the inside of her vagina, and that she “believe[d]” he touched her under her clothing. She testified that once the Defendant left, she “ran to [her] mama” and told her what happened.

On cross-examination, B.V. said she was thirteen years old on March 2, 2006, when this touching occurred. She said that, while the Defendant had been to her family's house several times, she never had a conversation with him. B.V. stated that she was wearing panties under her shorts, which came to about three inches above her knee and had a stretchy waistband. She said she was lying on her stomach in the bed and her little brother was close to her in bed. B.V. testified that "[she] didn't feel [any]thing until the hand entered [her] vagina and then that's when[] [she] woke up." B.V. stated that when she asked the Defendant to leave, she "said [it] in [her] normal voice" and did not scream or yell. She said neither her little brother nor sister ever woke up during the incident. B.V. said when she ran to her mother's room, her mother was standing at the window watching the Defendant's pick up truck drive away. When she entered her mother's room, B.V. heard the Defendant's loud truck. On redirect, B.V. again asserted that the Defendant's finger "was inside of [her]."

Sheriff Mark Logan, Sheriff of Moore County, testified that he took pictures of the window by B.V.'s bedroom. He said the window was a three-sectioned window, with only the two outside, smaller sections able to move. He said the window was eighty-three inches wide and forty-six inches high, and the sill was sixty three inches above the ground. The side panels of the window were each nineteen and a half inches wide. On cross-examination, Sheriff Logan testified that one side panel still had its screen, but the other panel's screen was off of it. He stated the police tested the screen for fingerprinting.

After the evidence was presented, the jury found the Defendant guilty of rape and aggravated burglary. The trial court held a sentencing hearing, at which neither side presented witnesses, and the court sentenced the Defendant to twelve years of incarceration for the rape, concurrent with six years for the aggravated burglary. It is from this conviction and sentence that the Defendant now appeals.

II. Analysis

On appeal, the Defendant raises two issues: (1) the State presented insufficient evidence to support the convictions; and (2) the trial court improperly sentenced him.

A. Sufficiency of Evidence

The Defendant contends that the evidence does not support his convictions for rape and aggravated burglary. The State counters that the facts found by the jury support the convictions.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see* Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both

direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). A conviction may be based entirely on circumstantial evidence where the facts are “so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone.” *State v. Smith*, 868 S.W.2d 561, 569 (Tenn. 1993). The jury decides the weight to be given to circumstantial evidence, and “[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.” *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citations omitted).

In determining the sufficiency of the evidence, this Court should not re-weight or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). “Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact.” *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

Viewing the facts in the light most favorable to the State, we conclude that the evidence sufficiently supports the Defendant’s convictions. We will address the rape and aggravated burglary convictions separately. “Rape is unlawful sexual penetration of a victim by the defendant . . . by any of the following circumstances: . . . (2) The sexual penetration is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the penetration that the victim did not consent.” T.C.A. § 39-13-503 (2006). “Sexual penetration” includes any “intrusion, however slight, of any part of a person’s body or of any object into the genital . . . openings of the victim’s.” T.C.A. § 39-13-501(7) (2006). In this case, the Defendant penetrated the victim’s vagina

with his finger while she slept, and the victim did not consent to this touching. The State sufficiently proved rape.

Aggravated burglary is when a person enters, without the consent of the owner, a habitation and commits a felony. T.C.A. §§ 39-14-403, -402 (2006). A habitation is “any structure . . . which is designed or adapted for the overnight accommodation of persons.” T.C.A. § 39-14-401 (2006). The Defendant entered the Carter residence in the middle of the night via a window in the laundry room. He did not have permission to enter the house. Upon entering the house, he raped a thirteen year old girl while she slept. These facts support a conviction for aggravated burglary. The Defendant is not entitled to relief on this issue.

B. Sentencing

The Defendant argues that the trial court erred when it sentenced him to the maximum sentences of twelve years for rape and six years for aggravated burglary. The Defendant claims that the trial court relied on enhancement factors not found by the jury in order to assign him the maximum sentences. The State responds that the Defendant committed his crime in March 2006, and the trial court properly sentenced him with regards to the 2005 Sentencing Amendments.

When a defendant challenges the length, range or manner of service of a sentence, this Court conducts a de novo review on the record with a presumption that “the determinations made by the court from which the appeal is taken are correct.” T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm’n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a de novo review of a sentence, we must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4) the arguments of counsel relative to sentencing alternatives, (5) the nature and characteristics of the offense, (6) any mitigating or enhancement factors, (7) any statements made by the defendant on his or her own behalf and (8) the defendant’s potential or lack of potential for rehabilitation or treatment. See T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

The trial court in this case sentenced the Defendant to the maximum sentences of twelve years for the rape and six years for the aggravated burglary. The trial court initially found that the

Defendant is a Range I Standard Offender for both crimes. Then, the court found that “no mitigating factors apply,” and began discussing enhancement factors. The trial court determined that the Defendant has a long history of criminal conduct and convictions. The Defendant admitted using marijuana daily and that he has been using it for twelve years. Additionally, the record indicates that the Defendant has prior convictions for aggravated assault, aggravated burglary, carrying a concealed weapon, and drug offenses. The Defendant has also violated his probation in another state. Moreover, the trial court focused on the fact that B.V. was thirteen years old at the time of the attack. Finally, the trial court placed significant weight on the enhancement factor that the Defendant committed the offense to gratify his own need for pleasure.

The Defendant committed the crimes in March 2006, which was about nine months after the new sentencing statute went into effect on June 7, 2005. T.C.A. § 40-35-101, et al. (2006). As such, the trial court sentenced him under the reformed sentencing laws, which give the court wide discretion when enhancing a sentence. *See id.* In this case, the trial court heard the evidence and applied the enhancement factors of the Defendant’s previous criminal behavior and convictions, the victim’s vulnerability due to her young age and that the Defendant committed the act to pleasure himself. Under Tennessee Code Annotated section 40-35-114 (2006), the trial court may use such factors to enhance the Defendant’s sentence. Given the timing of the Defendant’s crimes, the trial court was not required to utilize a *Blakely*, *Gomez*, or *Schiefelbein* analysis. *Blakely v. Washington*, 542 U.S. 296 (2004); *State v. Gomez*, — S.W.3d —, 2007 WL 2917726 (Tenn. 2007); *State v. Schiefelbein*, 230 S.W.3d 88 (Tenn. Crim. App. 2007). Moreover, in this case, enhancement factor number one, that the Defendant has a previous history of criminal convictions, is a sufficient basis to support his sentences of the statutory maximums, and that enhancement factor does not require a jury finding. *Gomez*, — S.W.3d —, 2007 WL 2917726, at *6 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). The trial court properly sentenced the Defendant, and therefore, he is not entitled to relief on this issue.

III. Conclusion

We conclude that the Petitioner’s convictions were supported by sufficient evidence, and the trial court properly sentenced him. Based on the foregoing reasoning and authorities, we affirm the judgments of the trial court.

ROBERT W. WEDEMEYER, JUDGE